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No. 00-203

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

CLEVELAND INDIANS BASEBALL COMPANY,
A LIMITED PARTNERSHIP,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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CLEVELAND INDIANS BASEBALL COMPANY'S OPPOSITION TO PETITION FOR CERTIORARI

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STATEMENT REQUIRED BY RULE 29.6

The Cleveland Indians Baseball Company is a limited partnership and does not have a parent company.

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REASONS FOR DENYING THE WRIT

The Government's petition for certiorari should be denied because there is no genuine conflict among the circuit courts of appeals and because the question presented does not merit the Court's attention. The Government devotes most of its petition to the contention that the Sixth Circuit made the wrong decision in *Bowman v. United States*, 824 F.2d 528 (6th Cir. 1987). We show below in Part II that the Government is mistaken, and that

Bowman has the right answer to the question presented. But first we show that there is no well-developed conflict among the courts of appeals.

I. THERE IS NO CONFLICT AMONG THE COURTS OF APPEALS.

At best, this petition is premature. There is no direct conflict among the circuit courts of appeals, and they may never reach conflicting conclusions as to the question presented. The Government exaggerates when it contends otherwise.

The question presented is exactly the question decided thirteen years ago in *Bowman*. There the Sixth Circuit held that awards of back pay should be allocated for payroll tax purposes to the years when the wage-earners earned the wages they were wrongfully deprived of. *See* 824 F.2d at 530. The court below followed *Bowman* as a controlling authority in this case, holding that back pay awards given to former Cleveland Indians players should be taxed under the Federal Insurance Contribution Act, 26 U.S.C §§ 3101-3128 ("FICA"), and the Federal Unemployment Tax Act, 26 U.S.C. §§ 3301-3311 ("FUTA"), according to the years the players actually earned these wages.

No court of appeals disagrees. In fact, this case and *Bowman* are the only court of appeals' decisions to address the question presented in a deliberate and considered way. Recognizing there is no real conflict, the Government writes nothing at all about other circuit court decisions until the eighteenth page of its petition. Then it tries to make a conflict out of cases that posed different questions or that dealt with this question in an off-handed, conclusory way.

One court of appeals has adopted the *Bowman* rule, but without discussion. In *Johnston v. Harris County Flood Control District*, 869 F.2d 1565, 1579 (5th Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990), the Fifth Circuit remanded its case so damages could be correctly calculated. In that context, it instructed

the trial court to determine whether the award was non-taxable damages under 42 U.S.C. § 1983 or a taxable award of back pay under Title VII, 42 U.S.C. § 2000e-5, *et seq*. *See id*. The court held that Title VII awards are taxable, citing *Bowman* for the rule that, at least for FICA purposes, "a plaintiff receiving a back pay award is liable for the taxes that would have accrued in the year the wages were due." *Id*. at 1580. The *Johnston* court did not otherwise discuss the point.

The point is similarly undeveloped, but with the opposite result, in *Hemelt v. United States*, 122 F.3d 204 (4th Cir. 1997), one of the cases that the Government uses to make a supposed conflict with *Bowman*. That is a long stretch, for *Hemelt* does not even cite *Bowman*. *Hemelt* arose after plaintiffs, former employees of Continental Can Company (and some 5,000 other class members), received settlement awards for their employer's violations of the Employment Retirement Income Security Act of 1974, 29 U.S.C. § 1132, *et seq*. ("ERISA"). *See id*. at 206. Plaintiffs contended their awards were not taxable as income and, even if taxable, were not "wages" for FICA purposes. *See id*. at 207-09. Neither of those issues arose in *Bowman* and neither arises here.

The *Hemelt* panel held that the awards were taxable income and, thus, wages for purposes of FICA. *See id*. at 209. *Hemelt* took up the question presented here only in the last paragraph of its decision, and then with little discussion. *See id*. at 210-11. Its legal analysis was perfunctory, based entirely on a Treasury regulation. *See id*. The panel cited no case law. *See id*. It did not even cite the Internal Revenue Code. *See id*. *Hemelt* gave equal weight to a second rationale that was entirely pragmatic: the total absence of any evidence from which the awards could have been allocated to the class members' years of service. *See id*. Thus, if such conclusory treatment can be called a conflict at all, it is between *Bowman* and the need for a practical solution to a class action problem or between *Bowman* and the Treasury Regulation. It is not a conflict between *Bowman* and *Hemelt*.

The Government stretches even further when it imagines a conflict between *Bowman* and the decisions in *In re Freedomland, Inc.*, 480 F.2d 184 (2d Cir. 1973), *aff'd sub nom. Otte v. United States*, 419 U.S. 43 (1974). *See* Pet. 20. The Government concedes that neither the Second Circuit in *Freedomland* nor this Court dealt "with the precise question presented in this case." Pet. 21-22. That is an understatement. Indeed, the supposed conflict with *Bowman* is no more than dictum, uttered without consideration for the issues that *Bowman* discussed and resolved.

The Court granted certiorari in *Otte* "primarily because the circuits are in disarray as to the priority to be accorded to withholding taxes on prebankruptcy wage claims." 419 U.S. at 47. The *Freedomland* and *Otte* dicta that the Government relies on dealt with *when* liability for payroll taxes arises. That answer, as *Freedomland* put it, "is too firmly embedded in the income tax law to permit of any question." *See Freedomland*, 480 F.2d at 189 n.8; *Otte*, 419 U.S. at 55. Nor is it disputed here; liability for these payroll taxes arose in 1994, when the former players received their awards. But that is not the question presented, which is whether the payroll taxes due in 1994 should have been calculated according to the rates and ceilings then in effect, or according to the rates and ceilings effective in 1986 and 1987 when the players earned the wages they did not receive until 1994.[1]

Just as *Hemelt* and *Freedomland/Otte* do not create a conflict with *Bowman*, neither does *Walker v. United States*, 202 F.3d 1290 (10th Cir. 2000). The *Walker* court considered the Self-Employment Contributions Act, 26 U.S.C. §§ 1401-1403

[1] The Cleveland Indians and the Government stipulated *for this case only* that these 1994 awards were "wages," as the term is defined for payroll tax purposes in 26 U.S.C. § 3121 and 26 U.S.C. § 3306. However, this wages issue is being litigated by other Major League Baseball Clubs in the cases that the Government lists in its petition. *See* Pet. 23.

("SECA"), and its corresponding regulations. *Walker* creates no conflict with *Bowman* because SECA is governed by different statutes and regulations than the FICA statutes and regulations at issue here and in *Bowman*.

The *Walker* court held that the self-employed attorney plaintiff had to pay SECA taxes calculated as of the years when he received the contingency fees at issue. The Tenth Circuit panel based its holding on Treasury Regulation § 1.1402(a)-1(c), which contains dispositive language that has no parallel in the regulations governing FICA. *See* 202 F.3d at 1291-93. The SECA regulation states as follows (with our emphasis on the clause that has no counterpart in the FICA regulation, Treasury Regulation § 31.3111-2(c)):

> Gross income derived by an individual from a trade or business includes gross income received (in the case of an individual reporting income on the cash receipts and disbursements method) or accrued (in the case of an individual reporting income on the accrual method) in the taxable year from a trade or business *even though such income may be attributable in whole or in part to services rendered or other acts performed in a prior taxable year as to which the individual was not subject to the tax on self-employment income.*

Treasury Regulation § 1.1402(a)-1(c).

By contrast, the corresponding FICA regulation, Treasury Regulation 31.3111-2(c), states only that "[t]he employer tax is computed by applying to the wages paid by the employer the rate in effect at the time such wages are paid." Presumably the Treasury would at least have added the italicized language to its FICA regulation if it had intended to treat "wages" the same way it treats self-employment income. Given *Walker*'s reliance on a SECA regulation that differs materially from the FICA regulation, the court's decision in *Walker* does not conflict with *Bowman*.

Further, the inherent differences in the Internal Revenue Code's treatment of SECA and FICA also evidence why there is no conflict with *Bowman*. The *Walker* court relied on the symmetry between the SECA tax and the income tax. *See* 202 F.3d at 1293 ("just as income is taxable when received for cash-basis taxpayers, so too self-employment income is subject to SECA taxes when received"). That symmetry is found in the Internal Revenue Code, which has the SECA tax in Subtitle A, entitled "Income Tax." But there is no parallel symmetry between the FICA tax and income taxes. FICA provisions are found in Subtitle C, entitled "Employment Taxes."

The legislative history shows that the difference in location was intentional and significant. The House bill imposing the SECA tax included the SECA provisions in the employment tax section of the Code. *See* H.R. Conf. Rep. No. 2271 (1950), *reprinted in* 1950 U.S.C.C.A.N. 3287, 3502. However, the House-Senate conference moved the SECA provisions to Subtitle A, the income tax section. *See id.* at 3502-03. The Conference Report explained that it did so because, "[in] view of the close connection between the self-employment tax and the present income tax, and in the interest of simplicity for taxpayers and economy in administration, . . . it is preferable to have the tax on self-employment income handled in all particulars as an integral part of the income tax." *Id.*

However, the same conference declined to adopt a Senate amendment that would also have combined the withholding of income tax and the FICA tax. *See id.* at 3506. That change would have simplified reporting for employers, who would have deducted a single sum for income taxes and FICA taxes combined. *See* S. Rep. No. 1669 (1950), *reprinted in* 1950 U.S.C.C.A.N. 3287, 3444-45. Thus, while Congress considered SECA tax and income tax sufficiently similar that they should be included in the same subtitle of the Code, Congress considered FICA tax and income tax to be too dissimilar to be positioned together in the Code or to be combined on employer returns. Because *Walker* dealt with a point of SECA taxation that is only superficially similar to the FICA tax at issue in *Bowman*, the two cases do not conflict.

In the end, the Government is left with only one case that squarely addresses this tax allocation issue and conflicts with *Bowman*. That is *Mazur v. Commissioner*, 986 F. Supp. 752 (W.D.N.Y. 1997), which deliberately rejected *Bowman* in favor of a Treasury Regulation that was in place when *Bowman* was decided. *See id.* at 755. But *Mazur* is a trial court decision. It does not present the sort of conflict that might merit the Court's review. The Government's petition is like the petition in *McCray v. New York*, 461 U.S. 961, 962-63 (1983) (Stevens, J., respecting denial of certiorari), where it was better to give lower courts more time to develop the issue.

The Government is appropriately underwhelmed by its showing of a conflict, and tries to bulk up its position by pointing to other refund suits brought by other Major League Baseball Clubs that present the same question. *See* Pet. 23. But those cases do not conflict with *Bowman* at all. So far only one of these baseball cases has gone to decision, and it followed *Bowman*. In *San Francisco Baseball Associates L.P. v. United States*, 88 F. Supp. 2d 1087 (N.D. Cal. 2000), Judge Conti independently assessed the FICA and FUTA allocation issue and was persuaded by *Bowman*:

> This Court finds the reasoning of the *Bowman* Court persuasive. In particular, this Court agrees that the clarity, symmetry, and fairness of the Social Security system is advanced by using the same allocation principle for both benefits and taxation.

Id. at 1094-95 (citing *Bowman*, 824 F.2d at 530).

The Government has appealed the decision in *San Francisco Baseball Associates* to the Court of Appeals for the Ninth Circuit. If the Ninth Circuit affirms, there will be no conflict with *Bowman* and no question deserving of this Court's attention.

Even if the Ninth Circuit decides to disagree with *Bowman*, other baseball cases pending in other circuits have the potential to build a better-developed body of circuit-court law, based on similar facts, which the Court could later evaluate in exercising its discretionary jurisdiction. But then is not now, and certiorari if and when there is a conflict will be soon enough.

II. THIS CASE DOES NOT MERIT REVIEW.

The Court typically exercises its discretionary jurisdiction only to decide the most important federal questions. *See* Sup. Ct. R. 10. The question presented is not important enough for the Court's review now, not even if there were a conflict among the circuits.

A. The Question Presented Has Not Been Litigated Frequently.

Contrary to the Government's rhetoric, the question presented has not been a frequently recurring issue. The Government represents that the law for taxing back pay has gone unchanged since 1946. *See* Pet. 11-12 & n.7. In the 54 years since then, this question of allocating back pay for FICA and FUTA purposes has spawned taxpayer litigation only four times: in *Bowman*, in *Hemelt*, in *Mazur*, and in these baseball cases each of which arises out of payments made under one discrete settlement signed in 1990. Thus, the Government exaggerates again in its petition when it writes that this issue "is likely to generate controversy and result in litigation." Pet. 22. The Government parades hundreds of thousands of back pay cases as if they were horribles destined to bury the courts in *Bowman*-like litigation. But litigation that averages once every thirteen years should not be called "likely." Especially where there is no real conflict among the circuits, this case is just not worth the Court's consideration on grounds of importance or frequency of occurrence.

Indeed, the Government did not seek certiorari in *Bowman* itself, thirteen years ago. If *Bowman* were truly the catastrophe

the Government now suggests it is, one would have expected the Government to have sought this Court's review then. Furthermore, the Government admits that it does not even follow *Bowman* in its administration of the tax laws. *See* Pet. 22. Thus, *Bowman* has not created administrative difficulties for the Government, nor has it spawned a flood of litigation.

B. *Bowman* Was Correctly Decided.

Although the Government devotes most of its petition to arguing that *Bowman* was wrongly decided, no manifest legal error compels the Court's attention. *Cf.* Sup. Ct. R. 10. In the end, the Government is wrong. *Bowman* got it right. *Bowman* keeps the Government from punishing these players for being the victims of the Clubs' collusion. The *Bowman* rule was intended to, and does, "advance the clarity, symmetry and fairness of the system." 824 F.2d at 530.

Bowman involved an employee who had settled a race discrimination lawsuit against his employer, Ford Motor Company ("Ford"), which had agreed to pay him back wages. *See id.* at 528-29. After Ford withheld FICA taxes on the maximum amount applicable to the year in which Ford paid the settlement money, Mr. Bowman filed a refund suit, contending *inter alia* that "FICA taxation of the settlement wages was improper because those wages represented back wages for years in which Mr. Bowman had paid maximum FICA taxes." *Id.* at 528-29.

The issue in *Bowman* is the same as the issue here: "whether the back pay should be taxable in the year the award is received . . . or in the year or years to which the back pay relates." *Id.* at 529. In answering this question, the Sixth Circuit relied on the Court's decision in *Social Security Board v. Nierotko*, 327 U.S. 358 (1946). *See Bowman*, 824 F.2d at 529-30. *Nierotko* involved an employee who was awarded back pay after the National Labor Relations Board determined he had been wrongfully discharged by his employer (coincidentally, also Ford) for his union activity. *See* 327 U.S. at 359. A unanimous Court

concluded that the award of back pay constituted wages for purposes of determining social security benefits and should be "allocated to the periods when the regular wages were not paid as usual." *Id.* at 370. Applying the Supreme Court's reasoning, the *Bowman* court concluded:

> If the payments are in fact for prior years and if, under *Nierotko*, they should be attributable to prior years for purposes of eligibility and other incidents of Social Security benefits and administration, we can see no reason for not applying this same principle in allocating the incidents of taxation. Where there is no good reason not to apply the same principle, we advance the clarity, symmetry and fairness of the system by using the same principle of allocation.

824 F.2d at 530.

The Government opens its argument for certiorari by contending that *Bowman* was wrongly decided. *See* Pet. 8-18. We show now that the Government is mistaken.

1. The Government conflates back pay with year-end pay, with unfair results.

If the Government's position were correct, employees who have been deprived of wages would also be punished for being victims. That is, the Government would make wronged employees who receive back pay awards pay a FICA tax that they would not have had to pay if they had not been wronged. Even so, because *Nierotko* holds that social security benefits associated with back pay are attributed to the years the employees performed services, they get no corresponding increase in social security benefits from the Government's piling-on. That result, which the Government advocates here, would be patently unfair. It is an unfairness forbidden by the Supreme Court's decision in *Nierotko* and by *Bowman*.

In its petition, the Government cites *Flemming v. Nestor*, 363 U.S. 603, 609 (1960), for the proposition that Congress has the

power to disconnect benefits from the payment of taxes. *See* Pet. 17. That is certainly true. *Flemming* held that it was not unconstitutional for Congress to terminate social security payments for an alien deported for having once belonged to the Communist Party. *See* 363 U.S. at 611-612, 621. But *Flemming* is irrelevant; the Cleveland Indians do not contend that the Government's position is unconstitutional, only that the Government wants to impose an unfairness *that Congress did not intend*.

a. Congress did not intend to penalize recipients of back pay.

The Government errs where it contends that *Bowman* misread the plain meaning of the statute. *See* Pet. 8-9. But *Bowman* got it right. Those code sections—26 U.S.C. §§ 3101(a),(b); 3111(a),(b); and 3121(a)(1)—govern the taxation of year-end pay, not back pay. Convenience and other compelling administrative reasons explain why, for example, wages paid in January for services performed in the previous year or month should be taxed in the year paid. That was Congress' focus in 1939 when it gave the relevant parts of 26 U.S.C. §§ 3101 and 3111 their present form. The earlier versions had tied payroll taxes to the years when services were performed. The House Ways and Means Committee explained the change solely in terms of the widespread confusion that would otherwise accompany the taxation of year-end pay, thus:

> [The earlier formulation] will unnecessarily complicate the making of returns and the collection of the taxes in later years when the rate of tax has been increased. For example, in 1943 the rate of tax increases from 1 per cent to 2 per cent. Thus, wages which are paid in 1943 for services performed in 1942 will be subject to the 1 per cent rate, while wages paid in 1943 for services performed in that year will be subject to the 2 per cent rate. . . . If employers have failed to make the proper distinction, many refunds and

> additional assessments will doubtless be necessary and confusion will result.

H.R. Rep. No. 76-728, at 57-58 (1939), *reprinted in* 1939-2 C.B. 538, 546.

Employers routinely pay wages in one year for services rendered in the previous year. Administrative convenience alone justified the 1939 amendments because any inequities would wash out over time. But the *Nierotko-Bowman* rule recognizes (and avoids) the unfairness that would result if these sections were woodenly applied also to back pay received years after the services were performed. Even *Mazur*, which the Government likes for its different result, acknowledges that the statutes are "not clear[]" as to their application to back pay. *See* 986 F. Supp. at 754. *Mazur* adds that the regulations are only "more clear," meaning that not even the Treasury's own hand-crafted texts dispose of the point. *See id.* The *San Francisco Baseball Associates* court agreed: "the Court finds that the statutes do not unambiguously apply to the cases of back-pay awards." 88 F. Supp. 2d at 1095.

Back pay awards are identical in timing to deferred compensation paid by agreement between an employer and employee. Congress does not subject the recipients of deferred compensation to FICA taxation twice. An employee who performs services in a particular year is subject to the FICA taxation ceiling in that year only, even when some of the wages are actually paid in future years under a deferred compensation arrangement. *See* 26 U.S.C. § 3121(v)(2). No FICA taxes are due on those deferred payments in the years when they are actually paid.

The *Nierotko-Bowman* allocation rule is entirely consistent with the policy for deferred compensation, its logical analogue. In each case, the employee is compensated eventually for work performed in an earlier year. *Nierotko-Bowman* requires both cases to be taxed the same way: the employee is subject to the maximum taxable FICA wage base in the year the employee

performed the services, not the year in which payment of a portion of the compensation for such services is delayed, whether by agreement or by employer wrongdoing. It would make no sense for Congress to lay a FICA tax on deferred compensation just once, but to tax back-pay twice. Why would Congress want to penalize employees who had to litigate their back pay awards but impose FICA taxes only once on employees who negotiated deferred compensation?

As *Nierotko* and *Bowman* held, the fair result is to allocate pay to the year in which services were performed. It is illogical to presume that Congress intended to tax similarly-situated recipients of deferred income differently.

b. The Government recognizes the concept of back pay.

Both the IRS and the Social Security Administration ("SSA") recognize that back pay is legally different from lag payments that employers typically make in one year for services performed near the end of the previous year. The SSA acknowledged the difference in its 1983 Program Policy Statement, SSR 83-7, 1983 WL 31239, at *1-2, specifically providing that it must follow *Nierotko* in allocating back pay awards to the year the services were performed. As SSA recognizes, its rules should not "defeat the intent of the [*Nierotko*] decision requiring SSA to credit and allocate a back pay award so as to place the employee in the position he or she would have been but for the wrongful action that was the basis for the award." *Id.* at *2. The IRS also understands that back pay is a creature distinct from year-end pay, as demonstrated by its publication, *Reporting Back Pay And Special Wage Payments to the Social Security Administration*, Pub. No. 957 (Sept. 1997).

The awards to these former players may not be back pay awards as the SSA defines them.[2] But that is immaterial, for these IRS and SSA publications make clear that back pay is a concept legally distinct from the year-end pay governed by 26 U.S.C. §§ 3101 and 3111 and the other statutes that the Government relies on. In fact, there is nothing in those statutes or in their legislative history to suggest that Congress intended to impose a penal FICA tax on persons whose wages were wrongfully delayed for several years.

c. This Court and *Bowman* require an allocation of back pay.

Nierotko requires that, if back pay is to be treated as wages at all, it must be "allocated to the periods when the regular wages were not paid as usual." 327 U.S. at 370. That is, recipients of back pay awards get credit for benefit purposes in the years when they would have received the wages but for the wrongdoing, not in the year when they actually received the payments. Nevertheless, the Government (ignoring *Nierotko*) wants to tax back pay as of the year of payment, a year in which (as *Nierotko* requires) the employees get no benefit credit. This creates an unfairness that *Bowman* refused to countenance, holding instead that the goals of the social security system are best met by the *Nierotko* "allocation principle":

> If the payments are in fact for prior years and if, under *Nierotko*, they should be attributable to prior years for purposes of eligibility and other incidents of Social Security benefits and administration, we can see no reason for not applying this same principle in allocating the incidents of taxation.

824 F.2d at 530.

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[2] SSA defines back pay to include only awards that flow from "an award, determination, or agreement approved or sanctioned by a court or administrative agency charged with enforcing a Federal or State statute protecting an employee's right to employment or wages." 1983 WL 31239, at *1.

Under the *Nierotko-Bowman* rule, back pay is taxed as it would have been but for the wrongdoing of the employer. For both Social Security benefits and taxation the employee is, and should be, no worse off for having been wronged.

d. Congress did not overrule *Nierotko* in 1946.

The Government argues in its petition that *Bowman* should not have relied on *Nierotko*'s allocation principle because Congress effectively overruled it in 1946 by changing benefit provisions of the Social Security Act. *See* Pet. 15-16. That is plainly wrong because the SSA follows *Nierotko* to this day. The SSA's 1983 Program Policy Statement discussing back pay states that, under *Nierotko*,

> Where the intent of the award is to place the person involved in all respects in the position he or she would have been [in] had there been no wrongful action, the wages, so far as crediting to the earnings record is concerned, are to be treated as though the person actually performed the services.

1983 WL 31239, at *2.

Nierotko insists (and the Government admits when it wears its SSA hat) that victims must not lose social security benefits as a result of their employers' wrongs. *Bowman* establishes a tax symmetry, so that victimized employees do not pay FICA taxes for years that, under *Nierotko*, do not count for benefits purposes. It is an elegant and fair system, one that was not (as the Government contends at page 16 of its petition) destroyed by the 1946 amendments to the Social Security Act.

In fact, the 1946 amendments only tweaked the more fundamental changes in the Social Security Act that Congress had made in 1939. By the 1939 amendments, Congress decided that the rates of FICA taxes would be calculated "with respect to wages paid during the calendar year," not "with respect to em-

ployment during the calendar year" as provided in the original Act. *See* Social Security Act Amendments of 1939, ch. 666, §§ 601, 604, 53 Stat. 1360, 1381-83. In contrast, the 1946 amendments cited here by the Government only brought the annual *ceiling* on taxable wages into line with the changes in FICA *rates* that Congress had adopted for year-end pay in 1939. *Nierotko* took the 1939 amendments into account, *see* 327 U.S. at 360 & n.5, but nevertheless applied the earlier statutes, those in effect when the services were performed. Because the 1946 amendments reflected the same policy choice as the 1939 amendments, the Government errs when it contends at page 15 of its petition that the social security scheme that *Nierotko* construed in 1946 differed significantly from the scheme that *Bowman* construed in 1987. *Bowman* read *Nierotko* perceptively, but the Government gets lost in details of administrative convenience, overlooking the principles of fairness and symmetry that *Nierotko* and *Bowman* taught.

2. The Government is unpersuasive in urging that the *Bowman* rule would burden taxpayers.

Taxpayers are rightly suspicious when the Government claims it wants to ease their administrative burdens. A case in point is the Government's argument in its petition that taxpayers would be unduly burdened if they had to treat back pay specially. *See* Pet. 17-18. In fact, the *Nierotko* rule as implemented by SSA and Treasury regulations already requires employers to identify back pay and report it separately. *See* SSA Program Policy Statement, 1983 WL 31239, at *1; IRS Pub. No. 957, at 2.

Moreover, taxpayers must already cope with other differences between income taxes and payroll taxes. For example, employee contributions to 401(k) plans are tax-deferred for income tax purposes but taxable under FICA in the year the services are performed. *See* 26 U.S.C. § 3121(v)(1). Nonqualified deferred compensation is taxed for FICA purposes in the year the services are performed, but is not subject to income taxes until the compensation is paid. *See* 26 U.S.C. § 3121(v)(2). There is no symmetry with income tax treatment.

In the end, arguments from administrative convenience do not carry much weight on tax issues. The Government lost when it made the same argument in *Nierotko* itself. The Court answered that, "[a]dmittedly there are accounting difficulties [from the Court's holding] which the [Social Security] Board will be called upon to solve but we do not believe they are insuperable." *Nierotko*, 327 U.S. at 370. Neither are the IRS' administrative problems insuperable, as shown, for example, by the existing dissymmetries in the tax treatment of 401(k) contributions and of non-qualified deferred compensation.

3. IRS regulations do not prove *Bowman* wrong.

The Government believes *Bowman* is wrong because it does not conform to Treasury Regulations. *See* Pet. 14-15. The Government cites a host of regulations at pages 12-14 of its petition, but does not mention that the official examples involve the taxation of year-end pay, not back pay. *See* Treasury Regulation § 31.3101-2(c), Example; Treasury Regulation § 31.3121(a)(1)-1(a)(2), Example; Treasury Regulation § 31.3306(b)(1)-1(a)(2), Example. It is not at all clear that the regulations apply to back pay. If they do, it is not clear that the regulations are consistent with the Congressional intent discerned in the legislative history discussed above at pages 11-12.

The concept of deference to agency rules "set[s] the framework for judicial analysis; it does not displace it." *See United States v. Cartwright*, 411 U.S. 546, 550 (1973). An agency may not rewrite, add to or expand a statute beyond what Congress intended. *See United States v. Calamaro*, 354 U.S. 351, 358-59 (1957).

Bowman considered the regulations that the Government relies on here, *see* 824 F.2d at 529, but decided they do not apply

to back pay. As discussed above, Treasury regulations may only supplement the intent of Congress. They may not undermine that intent by bringing back pay awards within the regime that Congress created for year-end pay. *Bowman* correctly declined to treat these regulations with the deference the Government wishes for.

CONCLUSION

There is no deliberate, well-reasoned split between *Bowman* and any other court of appeals' decision that could serve well as a foundation for the Court's harmonizing role. Maybe there will never be a conflict that needs the Court's attention. But if a conflict does develop, further consideration in the Ninth and, perhaps, other circuit courts of appeals is likely to serve the Court well when a definite conflict develops. *Cf. McCray*, 461 U.S. at 962-63. The question presented is not important enough, and does not arise frequently enough, for the Court's attention. Therefore, the Cleveland Indians Baseball Company asks the Court to deny the Government's petition for certiorari.

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